No. 75-103

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHNSON MANUFACTURING COMPANY OF LUBBOCK, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 511 F.2d 153. The Special Master's report is not officially reported.[1]

JURISDICTION

The order of the court of appeals was entered on April 14, 1975 (Pet. App. A6-A13). A timely petition for rehearing and suggestion of rehearing *en banc* was denied on June 3, 1975 (Pet. App. A59). The petition for a writ of certiorari was filed on July 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]A copy of that report has been lodged with the Clerk.

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly ordered the company to comply with previous orders of the Board and of the court to bargain in good faith with the Union by, in part, ceasing to insist upon a contract clause giving it unilateral and final control of bargainable matters, including employee wages and working conditions.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. A13-A16.

STATEMENT

A. The Board's Order and the First Contempt Adjudication

On April 5, 1967, the Fifth Circuit enforced the Board's order (Pet. App. A17, A55-A57) requiring petitioner (the Company) to bargain in good faith with Local 826, International Union of Operating Engineers, AFL-CIO (the Union). *National Labor Relations Board* v. *Johnson Manufacturing Co. of Lubbock,* No. 24,511 (unpublished) ("*Johnson I*"). The Board had found that the Company had engaged in surface bargaining with no intention of reaching an agreement with the Union. This conclusion was supported in part by the Company's insistence that it must unilaterally control all conditions of employment, coupled with its insistence that the Union could have no right to bargain over the resolution of employee grievances or to compel arbitration of disputes (Pet. App. A34-A35).

On April 6, 1972, pursuant to the Board's petition, the Fifth Circuit adjudged the Company in civil contempt of its decree. The court found that the "post-order proposals and positions of the company precisely parallel the surface bargaining we condemned in our enforcement order." *National Labor Relations Board* v. *Johnson Manufacturing Co. of Lubbock,* 458 F.2d 453, 456 ("*Johnson II*"). It ordered the Company, *inter alia,* to bargain in good faith with the Union, and, in the course of such good faith bargaining, to eliminate "its continued and rigid insistence upon unilateral, complete, and final control over all aspects of wage and working conditions, found by the Board to be unreasonable," and "its continued and rigid insistence upon Union relinquishment of statutory rights of effective participation in grievance negotiation and the settlement of labor disputes, and of effective representation in consideration of changes in working conditions by the Company during the course of Agreement" (*ibid.*).

B. The Second Contempt Adjudication

On April 14, 1975, pursuant to the Board's second petition, the court of appeals, adopting the findings and conclusions of its Special Master, held that the Company and its president "are in flagrant contempt of the April 6, 1972 order of this court" (Pet. App. A1, A3) ("*Johnson III*"). The court concluded that the Company had "ignored in material part" its prior directions "to eliminate management's insistence upon unilateral control of all aspects of wage and working conditions which in turn meant union relinquishment of the statutory right to participate in grievance negotiations and the settlement of labor disputes with respect to changes in working conditions" (*id.* at A4). The court ordered the Company and its president to comply in full with the earlier judgments, and specified that this included the obligation to cease and desist "from insisting on unilateral and final control over employee wage

and working conditions, and other matters which are bargainable subjects" (Pet. App. A7). The Company now seeks review of the latter provision of the order (paragraph 1 (d)).[2]

ARGUMENT

The order issued by the court of appeals is proper and is not in conflict with decisions of this Court or other circuits.

1. Petitioner contends that paragraph 1(d) of the order is contrary to *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, and *H.K. Porter, Inc.* v. *National Labor Relations Board*, 397 U.S. 99, because it will "compel the Petitioner to accede to Union demands that it withdraw its proposal for a 'management clause' in the collective agreement being negotiated and include therein a grievance clause terminating in binding arbitration or in the alternative, preserving a right to strike at all stages of the grievance procedure and not just at the conclusion thereof" (Pet. 6). This contention misconceives both the holdings in those cases and the scope of paragraph 1(d).

In *American National Insurance Co.*, this Court concluded, the Board had held that the employer's "action in bargaining for inclusion of *any* [management functions] clause 'constituted, quite [apart from] Respondent's demonstrated bad faith, *per se* violations of Section 8(a)(5) and (1)' " (343 U.S. at 400; emphasis

[2]On July 9, 1975, Mr. Justice Powell denied the Company's application for a stay of that provision pending the filing and disposition of the present petition.

added). The Court held that this approach was contrary to Congress' intention that "[t]he duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether (*id.* at 409).[3] Since the court of appeals (also the Fifth Circuit) had found that "the evidence, viewed as a whole, [did] not show that [the employer had] refused to bargain in good faith by reason of its bargaining for a management functions clause as a counterproposal to the Union's demand for unlimited arbitration," the Court held that management's insistence on a management functions clause did not support the Board's finding of an unlawfull refusal to bargain (*ibid.*).

Here, on the other hand, the Board and the court of appeals did not rely upon the Company's "mere" insistence on a management prerogative clause. The Board's original order was based on its finding that petitioner had, through numerous obstructive tactics, engaged in bad faith bargaining in violation of Section 8(a)(5) and (1) of the National Labor Relations Act; while this finding was predicated in part on petitioner's insistence upon a sweeping management rights clause, that insistence was "appraised by taking into account the to-

[3]The Court added that "[a]ny fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to 'rates of pay, wages, hours and conditions of employment' do not justify condemning all bargaining for management functions clauses covering any 'condition of employment' as *per se* violations of the Act" (343 U.S. at 409).

tality of [petitioner's] conduct" (Pet. App. A28). Similarly, in *Johnson II* and *III*, the court held that petitioner had continued to engage in "mere surface bargaining," and that part of this sham consisted of its continued insistence "upon unilateral control of all aspects of wage and working conditions which in turn meant union relinquishment of the statutory right to participate in grievance negotiations and the settlement of labor disputes with respect to changes in working conditions" (*Johnson III*, Pet App. A4). Nothing in *American National Insurance* precludes the Board from relying on an employer's adamant insistence on an unusually broad management prerogative clause[4] as one factor, among others, to support an inference that the employer had no intention of reaching an agreement and thus was not bargaining in good faith.[5]

Nor is paragraph 1(d) inconsistent with this Court's holding in *H.K. Porter, supra*, 397 U.S. at 102, that "the Board * * * is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement."[6] Paragraph 1(d), when read in the light of the court's opinion and its earlier decrees, does not compel petitioner to agree to any particular provision, or to forego insistence on any management prerogative clause whatever. It merely prohibits petitioner from demanding a clause so sweeping that, as a practical matter, the Union would be denied its statutory right to "meet * * * and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(d), 29 U.S.C. 158(d). Cf. *National Labor Relations Board* v. *Katz*, 369 U.S. 736.

2. Petitioner's assertion (Pet. 14-16) that there is a conflict among the circuits on this question is inaccurate. *International Woodworkers of America, Local* 3-10 v. *National Labor Relations Board*, 458 F.2d 852, 857-858 (C.A. D.C.), merely upheld the Board's finding—which was in turn based on a review of the employer's total bargaining conduct and "its 30-year history of contractual relations with the Union"—that the employer had not demanded a management rights clause in bad faith so as to evade its bargaining obligation.[7] The court noted, how-

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[4]The clause in *American National Insurance* was limited to such matters as promotions, discipline, and work scheduling (343 U.S. at 397), and it was not coupled, as here, with the requirement that the union relinquish significant statutory bargaining rights respecting changes in working conditions.

[5]Only a few of the many instances of bad faith described by the Special Master in his 93-page report were specifically noted by the court in *Johnson III*. But, as the court's opinion alone indicates, the Company had failed to provide vital bargaining information to the Union, granted a discriminatory wage increase to employees who did not join a strike to protest the Company's bad faith bargaining, and imposed a retaliatory transfer on a member of the Union bargaining team (Pet. App. A4-A5).

[6]In *Porter*, the Board had ordered the employer to agree to such a clause as a remedy for the employer's refusal to bargain in good faith concerning a contract clause for the checkoff of union dues (397 U.S. at 102).

[7]Similarly, in *Peerless Distributing Co.*, 144 NLRB 1510, 1513, also cited by petitioner (Pet. 16), the Board held only that the company's "insistence, in good faith, on [a particular] subcontracting clause was not unlawful."

ever, that it had "no doubt that a union can be confronted with management rights proposals under bargaining circumstances which point unmistakably towards a company purpose to frustrate the achievement of a contract." *Id.* at 860.

Moore of Bedford, Inc. v. *National Labor Relations Board*, 451 F.2d 406 (C.A. 4), certiorari denied, 405 U.S. 1074, concerned a contract clause giving the employer unilateral control over piecework rates. The court of appeals found (*id.* at 409) that the proposal was not made in bad faith since "the Company never refused to negotiate the base rate" by which the piece rate floor was determined.[8] The court of appeals also noted (*id.* at 407, n.2) that there, unlike here, the "General Counsel conceded 'that in no other respect is there distinct evidence of anti-union animus or illegal conduct.' "

3. Even if petitioner is correct in its assertion that it is entitled to insist upon its management prerogative clause, its complaint comes too late. The Board's order was enforced in 1967, and petitioner's proper course, if it believed that it was entitled to act as it has, was to come to this Court then. It did not do so, but acted (as the court of appeals concluded in 1972) in defiance of the court's order. The court held that "[t]he post-order proposals and positions of the company precisely parallel the surface bargaining we condemned in our enforcement order" (*Johnson II, supra*, 458 F.2d at 456) and expressly ordered petitioner to "eliminate its continued and rigid insistence upon unilateral, complete, and final control over all aspects of wage and working

[8]The court's dictum (*id.* at 410) that the Board's order would have violated Section 8(d) of the Act, "[e]ven if the Company had actually refused to bargain realistically about wages," was predicated on its construction of the order as requiring agreement to a particular contractual provision. As noted above (pp. 5-7), the order here does not have this effect.

conditions" (*ibid.*). This portion of the 1972 contempt adjudication is identical in all material respects to paragraph 1(d) of the order of which petitioner now complains. Again petitioner had an opportunity to seek review in this Court; again petitioner, instead of complying or seeking review, stood in contempt. It is not without reason that the court of appeals called petitioner's conduct "flagrant" (Pet. App. A3).

This Court has held that, even when an injunction unconstitutionally abridges basic First Amendment freedoms, the proper course is to obey it and seek review, not to defy the order. *Walker* v. *City of Birmingham*, 388 U.S. 307. We submit that this salutary principle should apply to the enforcement of judicial decrees of the sort entered in *Johnson I* and *Johnson II*; petitioner should not have the option of disclaiming any obligation to comply with orders that have been outstanding for eight years and which have been only clarified—not created—by the most recent adjudication of contempt.

4. Finally, we note that paragraph 1(d) was imposed upon petitioner as a penalty for contempt of court, not as a remedy created by the Board to rectify an unfair labor practice. The courts, as part of their power to penalize a contemnor, should be able to impose strong and effective sanctions that will deter contempt, not just to "make whole" the victim of the contemnor's misdeeds. It follows that courts should be able to devise sanctions that may not be open to the Board in the first instance. Therefore, even if paragraph 1(d) would have been beyond the Board's authority, it was not outside the power of the court. Cf. Bartosic & Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 U. Chi. L. Rev. 255, 263-266 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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